1964

Goldring Packing Co. v. H & M Cattle Co. et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GOLDRING PACKING CO., INC.,
Plaintiff-Respondent,

vs.

H & M CATTLE CO., dba H & M DRESSED BEEF CO., and GREAT WESTERN PACKING AND CATTLE COMPANY, et al.,
Defendant and Appellant.

Case No. 10091

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court for Salt Lake County
Honorable Ray Van Cott, Jr., Judge

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TABLE OF CONTENTS

CASES CITED

TEXTS

IN THE SUPREME COURT OF THE STATE OF UTAH

GOLDRING PACKING CO., INC.,
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STATEMENT OF THE KIND OF CASE

This is an action for moneys claimed due against which defendants claimed a credit for killing 8,151 ewes for respondent at a charge of $3.00 per head; respondent claimed an oral contract for killing ewes at the rate of fifty cents per head.

DISPOSITION IN LOWER COURT

The case was tried to a jury which found an oral contract for killing ewes at fifty cents a head upon

special interrogatory. From Judgment entered accordingly for the plaintiff-respondent, defendant-appellant Great Western Packing and Cattle Company appealed.

STATEMENT OF FACTS

Sometime during May of 1961, Mr. Henry M. Hendler, General Manager of Goldring Packing Company, plaintiff and respondent, attended a meeting at the McFarland packing plant in Salt Lake City with the following defendants: Ray McFarland, Leonard O. Thayer, Wayne Hodson, Vance Hodson, Earl Jerry Morgan and Roy Morgan. (R. 169, 180, 183, 184, 194, 196). These individuals were seeking ways and means of creating a unified integrated operation at the McFarland meat packing plant at 2922 South Main Street in Salt Lake City, Utah. (R. 193, 194). Messrs. Hodsons and Morgans were officers and principals in the defendant company, H & M Cattle Company (hereinafter sometimes referred to as H & M), which, prior to the meeting with Hendler, had been operating a "custom kill" slaughtering operation at the McFarland plant (R. 218, 238, 233, Ex. 3). Mr. Ray McFarland was an employee of H & M Cattle Company (R. 198, 208). The defendant, Leonard O. Thayer, together with H & M and its principals, subsequently was an incorporator and president of the defendant-appellant, Great Western Packing and Cattle Company (hereinafter sometimes referred to as Great Western) (R. 249, Ex. 4).

At the meeting above referred to, discussion was held relative to an agreement for the slaughter of respondent's livestock at the McFarland plant. Hendler offered to supply cattle and sheep belonging to respondent for slaughter at the plant; and he offered to pay for the slaughtering services the sum of $3.00 per head for cattle, together with the inedible offal, and the sum of fifty cents per head for sheep (including both lambs and ewes), together with both the edible and inedible offal. Any overtime kill was to be compensated for at the rate of an additional fifty cents per head. Both parties to the agreement were to have the right to terminate the same at any time. (R. 169, 170, 196, 197). The consensus of those present was that this was "fine," which they announced. They said they would accept it and they all shook hands on it. (R. 172, 185, 186, 187, 197). Thereafter, cattle, lambs and ewes were submitted by respondent to the defendant H & M Cattle Company and its successor, Great Western Packing and Cattle Company, the appellant, and from the 10th day of July, 1961, to and including the 20th day of September, 1961, these two entities slaughtered 8,151 of respondent's ewes. (R. 164, 190, 191, Ex. 1). On the 20th day of September, Great Western terminated the agreement because it purportedly could not continue to kill sheep at fifty cents a head. (R. 182, Ex. 1). Until the 4th day of August, 1961, the defendant H & M Cattle Company was operating the McFarland plant, custom killing for respondent, and doing business under the assumed name of

H & M Dressed Beef Co. (R. 198, 219, 220). On the 4th day of August, appellant was incorporated, assumed the operation from H & M, one of the incorporators and principal stockholders of appellant and also did business as H & M Dressed Beef Co. (R. 219, 220, Ex. 2, Ex. 4). Appellant likewise assumed the obligations of H & M; and it is stipulated below that Great Western is bound by any agreement found to exist with H & M. (R. 91-92). Respondent received from H & M Cattle Company, and later, Great Western, seven invoices billing respondent at fifty cents a head for "kill" charges for the weeks ending July 21, August 4, August 11, August 18, August 25, September 1 and September 8. (R. 174, Ex. 2). The invoice No. 3940 for the week ending July 21, 1961, bills respondent for custom kill charges on 2,469 head of *"sheep"* at fifty cents per head. The invoice for the week ending August 11 bills respondent for kill charges of *"lambs and ewes"* at fifty cents per head. All other invoices refer only to "lambs" at fifty cents per head. However, a comparison of the number of "lambs" shown on these other invoices with the number of sheep (both lambs and ewes) killed for the same period as reflected on the kill sheet summary, Exhibit 1, reveals that with two exceptions, the number of lambs indicated on each of these invoices and billed to respondent at fifty cents a head is, in fact, the total number of both lambs and ewes killed for that particular week. This is more graphically demonstrated by the following chart, to-wit:

PER KILL SHEET (EX. 1)

Week Ending	No. of Ewes killed	No. of Lambs killed	Total	No. per Invoice (Ex. 2)
July 21, 1961	1268	1171	2439	2469*
August 4, 1961	987	2129	3116	1584
August 11, 1961	542	1784	2326	2296*
August 18, 1961	622	1161	1783	1840
August 25, 1961	1235	792	2027	2027
Sept. 1, 1961	696	1851	2547	2547**
Sept. 8, 1961	841	1203	2044	2043**

**Note: On Invoice for September 8, 1961, it reflects 390 head "short last billing." This number was added to the total shown on invoice for week ending September 1, 1961, and deducted from invoice for week ending Sepetmber 8, 1961.

*Note: On Invoice for July 21, 1961, there is a 30 head discrepancy where respondent was billed for 30 more head than killed. On invoice for August 11, 1961, this discrepancy is cured by billing for 30 head less than killed.

The two exceptions illustrated by the above chart relate to the killing for the weeks ending August 4, 1961, and August 18, 1961. The number of animals billed August 4 in the amount of 1,584 compares with neither the number of lambs nor ewes killed during that week, and respondent cannot explain this discrepancy. For the week ending August 18, 1961, Goldring Packing Company was billed for 57 more head than were killed during that week. However, it should be noted that the number for which respondent was billed was considerably greater than the number of lambs

only killed during that particular week. The remaining five invoices subject to the adjustments noted on the chart reflect the identical total of both lambs and ewes killed for the respective week. These billings all were paid by respondent. (R. 176).

ARGUMENT

POINT I. THERE IS SUBSTANTIAL EVIDENCE OF RECORD TO SUPPORT THE VERDICT OF THE JURY.

It is axiomatic that on this appeal, this court must view the evidence below in the light most favorable to respondent. *Ortega v. Thomas,* 14 Utah 2d 296, 383 P.2d 406 (1963). All of the evidence and every influence and intendment fairly arising therefrom should be taken in the light most favorable to the finding made by the jury below. *Rummell v. Bailey,* 7 Utah 2d 137, 320 P.2d 653 (1958). Because the principal thrust of appellant's argument attacks the sufficiency of the evidence to support the jury's finding of an oral contract, extracts of pertinent portions of the testimony of respondent's witness, Henry Hendler, are set forth at some length, as follows:

> "Q. I asked you to relate the substance of the conversation. What was said at that time?
>
> A. Oh, at that time they were killing or slaughtering, custom slaughtering; and at that time they asked me whether I would let them custom slaughter livestock for our company at their plant.

Q. What did you say to that?

A. I thought it would be an excellent idea.

Q. Was there any discussion at that time with respect to the terms of this slaughtering arrangement?

THE COURT: You can answer that 'yes' or 'no'.

THE WITNESS: Yes.

MR. SAPERSTEIN: All right, and what was that conversation?

THE WITNESS: We evolved terms as follows: Three Dollars for cattle plus inedibles and fifty cents for *sheep* plus inedibles and edibles." (R. 169, 170).

* * *

THE WITNESS: All right. Ray McFarland, who was the spokesman for the group, accepted this, and said that would be fine with them, and the rest of them all either kept quiet or agreed and accepted it.

MR. SAPERSTEIN: Did anyone indicate any objection to that price?

THE WITNESS: No. There was a question at that time as to whether or not ewes would take a long time to kill and for my firm I explained to them that we felt that they could have the condemned carcasses, because through inspection they occasionally condemned carcasses, and this would give them an extra certain amount that they would have the condemned carcasses as additional payment for the function which they could reduce the meat from, which they

seemed to accept. They said they would accept it." (R. 172).

* * *

MR. SAPERSTEIN: Can you fix the approximate date as to this conversation?

THE WITNESS: It was the early part of the summer, when this conference was first conceived ,when we made the deal, around May or something like that.

Q. What was said?

A. I stated to them that we would pay them fifty cents to kill sheep and that was our deal and that is all that was to be said. And at that time they thought they could not function and if they didn't want to do it they could terminate it and we reserved the right of termination ourselves.

Q. What did they say in response to that statement?

A. They accepted it. (R. 180, 181)."

* * *

And on cross-examination:

"Q. And it was Mr. Ray McFarland who spoke up and said he would kill those ewes for fifty cents?

A. The group agreed among themselves and discussed it with me and I discussed it with them.

Q. But to answer my inquiry: which one person?

A. I don't remember which one of them; they were all speaking to me at that time; each one had a little something to say.

Q. I think this morning you had Mr. Ray McFarland saying that he would do it; is that true?

A. He did most of the talking. He was the most knowledgeable one of the group.

Q. You didn't actually say whether he said he would do it for fifty cents or not?

A. I know he said it. There was agreement among the group and I had a complete understanding with them.

* * *

MR. BERRY: What I would like to be sure of is that only Mr. McFarland said he would kill them for fifty cents?

THE WITNESS: They were all taking part in the conversation. Ray did most of the talking and the rest of them all had something to say. We were sitting in a group and I was talking to them and they were talking to me, and I said I would give them fifty cents and that was to be our price and we would not be interested in paying anything more. And they accepted individually or collectively; they were all sitting there and I cannot specifically say that Mr. Morgan said 'yes' and the others didn't say anything I don't know.

* * *

THE WITNESS: Ray McFarland agreed to it; Leonard Thayer was sitting there and agreed to it; Morgan, he was sitting there and I don't know what he said. I think they were all sitting there in front of me and I cannot remember which one was the spokesman because each

one had something to say. But there was a complete meeting of the minds." (R. 185, 186).

* * *

"THE WITNESS: They all had something to say, how nice it was of me to take an interest in their group and how we were all interested in getting along together. I was supplementing their kill, and I told them they should — they were killing on their own and we were not providing the complete kill for them. They were in business and we were supplementing their kill. These were parts of the conversation that took place and there was agreement. I stated we would pay fifty cents to kill sheep, no more. Fine. And we would pay Three Dollars to kill cattle. Fine. And we all shook hands and went about our way." (R. 187).

* * *

"Q. Mr. Hendler, Mr. Berry has searched your memory to show specifically what one or the other said. I realize this was a long time ago, but do you recall what objections, if any, were made by anyone to this proposal that you stated?

A. One of the questions asked by one of the less informed of the group, as to the mutton kill: 'Does a ewe kill slower than lambs?' I said, 'Yes ,they are slower. However, you may have the condemned carcasses.'

* * *

THE WITNESS: I told them they would have the condemned carcasses as additional compensation.

Q. Did anyone object to the proposition? Did anyone stand up and say: 'I will not go along with it; or words to that effect?

A. No. They were all very pleased that we were going to give them material to custom slaughter.

Q. And did you give them the material to custom slaughter?

A. Yes, we did.

D. Did they slaughter?

A. Yes." (R. 190, 191).

To the same effect is the testimony of the defendant, Ray McFarland, as follows:

"Q. Did you at any meeting discuss terms with Mr. Hendler with respect to this kill?

A. Yes.

Q. When did this meeting take place when you discussed the terms?

A. In the early summer of '61.

Q. Do you recall more specifically when that might have been? Was it June or July?

A. It was in the first of June or the last of May.

Q. Where did this meeting take place?

A. It took place in the same conference room.

Q. And who was present at that time?

A. Jerry Morgan, Wayne Hodson and Leonard Thayer.

Q. And was Mr. Hendler there?

A. Yes.

Q. All right. Now relate the conversation at that time with respect to terms.

(Objection interposed at this time)

MR. SAPERSTEIN: All right, now; you may answer.

THE WITNESS: We first started discussing custom cattle killing, because that was what was more in our line at that particular time, and we determined upon three dollars a head for killing cattle. Then we got into killing *sheep,* and Mr. Hendler said he would offer us fifty cents a head for killing *sheep.*

Q. Who was to retain the pelt?

A. Goldring was to retain the pelt.

Q. Who was to have the offal of the sheep?

A. We were to have the edible and inedible offal.

Q. And what did you say in response to the propositon made by Mr. Hendler.

A. We agreed.

Q. Was there any comment from any of the other individuals present at the time?

A. They agreed.

Q. I beg pardon?

A. They agreed.

Q. Subsequent to that, Mr. McFarland, did the Goldring Packing Company submit sheep to be slaughtered there at the McFarland plant?

A. Yes, later; and we killed cattle.

Q. Cattle and sheep were submitted to you?

A. Correct.

Q. And they were killed?

A. They were." (R. 195, 196, 197).

Evidence substantiating McFarland's and Hendler's testimony as to an oral contract having been made at the meeting above referred to is contained in Exhibit 2, the series of billings received by respondent from H & M Cattle Company and later, Great Western. These documents bill respondent for slaughtering respondent's ewes at the agreed charge of fifty cents per head. Although five of the seven invoices use the word, "lambs", as illustrated, supra, the number of animals shown on the invoice was the total of both the lambs and ewes killed in the period covered by the billing. Respondent honored these billings by payment accordingly.

The logical import of these invoices is that there was a contract between the parties whereby H & M Cattle Company was to kill ewes at the rate of fifty cents per head. Otherwise, H & M, and later, Great Western, would presumably have billed respondent at some other figure. All of the invoices, with one exception, were prepared by a Mr. W. Dennis Couch, a witness called by appellant, who was, in his own words, "office manager, collections manager, and the general fellow to run the plant." (R. 252, 253). Mr. Couch admitted on cross-examination that at the time in question he had about "five different bosses," including Jerry Morgan, Leonard Thayer, Wayne Hodson, Roy Mor-

gan, all of whom were principals in either H & M Cattle Company or the appellant, Great Western Packing and Cattle Company, or both. (R. 255, Ex. 3, Ex. 4). Couch, despite his protestations to the effect that he had been advised by his "bosses" only with respect to the agreement between the parties as to the amount to be charged for killing lambs and killing cattle, but not ewes, he nevertheless admitted that he did not bill respondent more than fifty cents for ewes because he *knew* an amount in excess of fifty cents would not be paid. (R. 258, 259).

As discussed infra, these invoices have additional significance as part of the acts, conduct and declarations of H & M Cattle Company, which conduct and declarations per se may properly be considered by the jury as an acceptance of respondent's offer.

That the oral agreement existed is given further credence by Hendler's testimony that appellant terminated the agreement because it could not "economically kill at fifty cents per head." (R. 182). Appellant explains that this statement related only to lambs, a contention the jury justifiably rejected in light of the fact that it was made after appellant and H & M had admittedly killed 8,151 ewes.

It is submitted that the evidence relative to the meeting between Hendler and the principals of H & M Cattle Company, standing alone, was amply sufficient for the jury to determine that an oral agreement for the killing of ewes at the rate of fifty cents a head had

been struck at the time of the meeting. When this evidence is viewed in the light of the undisputed fact that 8,151 ewes were, in fact, killed and that respondent was billed for most of this number (no billings were received for the weeks ending September 15 and September 22) at the rate of fifty cents per head, appellant's argument, it is submitted, is somewhat less than compelling.

It is further submitted that the jury could have also based its finding of an oral contract by viewing H & M's conduct in killing Goldring ewes, charging fifty cents per head therefor, and accepting payment payment thereof, as constituting an acceptance of the offer made by respondent at the May meeting.

Whether the contract be bilateral or unilateral, it is respectfully submitted that there is substantial evidence to support the jury's finding that there was, in fact, an oral agreement to kill ewes at fifty cents per head.

Appellant attacks the foregoing evidence as being insufficient as a matter of law to sustain the jury's finding of an oral contract between the parties. This attack is based essentially upon four assertions:

(1) That the offer made by Goldring was made to a "group", not H & M Cattle Company as such, and that, therefore, H & M Cattle Company could not accept the offer, not being the offeree;

(2) That the period from May to August 17,

1964, the date of the written agreement (Exhibit 5), was simply a period of negotiation and that the offer made by Goldring with respect to the killing of ewes at fifty cents per head was not only rejected by the defendants but revoked by respondent prior to acceptance;

(3) That since there is no testimony to the effect that one or more of the principals of H & M Cattle Company by name said, "I accept", the silence of the individuals involved cannot be construed as an acceptance; and

(4) That the only evidence of record to substantiate the finding of an oral contract are the "conclusions" of the witness Hendler.

Taking each of these contentions in their order above stated, let us first examine the proposition advanced that there can be no oral contract as a matter of law because the offer made by Goldring Packing Company was not accepted by the offeree. This assertion is based upon the fallacious assumption that the offer made by respondent at the meeting in May of 1961 was made to some shapeless entity yet to be formed. The facts are, of course, otherwise. The offer was made to the individuals present, four of whom were officers and principals of H & M Cattle Company, one of whom was subsequently an incorporator and president of the appellant Great Western Packing and Cattle Company. The meeting was held with these persons because through H & M they were and would be the

ones operating the McFarland plant; and these individuals through the entities of H & M Cattle Company and Great Western Packing and Cattle Company, did, in fact, then and thereafter operate the McFarland plant. To say, therefore, that no offer was made to H & M Cattle Company is not only to ignore the realities of the situation apparent from the record, but to somehow argue for a separation of a corporate entity from its flesh and blood agents. In so doing, appellant is foisting upon this court its own view of the evidence, not the view to which the evidence is susceptible and to which obviously the jury subscribed. See *Ortega v. Thomas*, supra.

Moreover, appellant misconceives the application of the rule of law which it attempts to assert. No one will quarrel with appellant's assertion that if X makes an offer for services to be performed by Y, and Z seeks to perform those services, that X cannot be bound *absent his consent*. The reason for the rule is that X is entitled to contract with whomsoever he pleases. However, applying this doctrine to the instant case, appellant places itself in the peculiar position of urging the court to defeat the rights of the offeror by a rule of law clearly developed to preserve the rights of the offeror.

The point is that under any view of the evidence, respondent was obviously "pleased" to deal with H & M Cattle Company and accepted the tendered performance by H & M. The rule is one devised for the protection of the offeror not for the protection of the

acceptor; and if a stranger to the offer performs in accordance therewith, and the offeror permits performance, the tender of the performance is in essence a new offer and the receipt of the performance is an acceptance thereof. 1 Williston on Contracts, 3rd Ed., Sec. 80, p. 265. Accordingly, even under appellant's view of the evidence, a binding contract resulted.

With respect to appellant's second contention, it is once again rather clear that this contention is also grounded upon certain assumptions that can be made only by viewing the evidence in a light most favorable to the appellant, not the respondent. The written contract (Ex. 5) introduced by appellant, according to appellant's own theory of the case, is silent with respect to the killing of ewes. It is therefore difficult to perceive how it can ipso facto constitute either a rejection or a revocation of an offer concerning a subject matter it does not purport to cover; and the jury was, therefore, properly given the opportunity to supplement the same by finding an oral agreement with respect to ewes in accordance with respondent's evidence. *McCarren v. Merrill,* .... Utah 2d ...., 389 P.2d 732, 733, (March, 1964); *Charlton v. Hackett,* 11 Utah 2d 389, 360 P.2d 176, (1961).

This argument also overlooks the rather elementary precept that when an offer is accepted, a contract results, and accordingly, there is no longer extant an offer to be either revoked or rejected. The bargain with H & M had been struck long before August 17, 1961.

As discussed, supra, the jury could have found an acceptance of respondent's offer at either the meeting of the parties in May or by the killing of respondent's ewes in July and thereafter and the billing therefor upon respondent's terms.

To say that the written contract, appellant's Exhibit 6, conclusively proves that the parties were merely negotiating from May to August 17, 1961, is to once again ignore the evidence of record detailed above, to wit: the meeting in May, the actual submission of ewes by respondent to H & M and the slaughtering thereof before and after August 17, 1961, the date of the agreement; and the billings therefor at the rate of fifty cents per head in accordance with respondent's offer.

With respect to appellant's third contention enumerated above, once again appellant requires respondent to argue facts rather than law. This contention assumes, of course, that there was, in fact, silence upon the part of the principal officers of H & M Cattle Company in response to the offer made by Hendler during the May meeting. It is respectfully submitted that the jury could readily infer from the testimony of record detailed above that there was acceptance by *all* of the parties present at the time of the meeting. Assuming arguendo only, that H & M was silent, appellant erroneously assumes that there was no duty to speak on the part of the principals of H & M Cattle Company. It is respectfully submitted that in logic and good reason where an offer is made to five persons, so closely

inter-related in the operation of the packing plant as were those five at that meeting in May, if the principals of H & M Cattle Company were not to be bound by an acceptance of the offer made at the time of this conference, then in light of all the facts and circumstances then existing and the interrelationship of those present, they were duty bound to so state. 1 Williston on Contracts, 3rd Ed., Sec. 91B, P. 328. The evidence is undisputed that no one voiced an objection to such acceptance or to doing business with respondent upon the terms offered by Hendler. The evidence, moreover, is abundant that such business was in fact thereafter conducted with Goldring Packing Company upon the basis of the very terms proposed at the meeting.

Assuming, however, for the sake of argument, that there was not an acceptance at the date of the conference in May, the evidence, as discussed, supra, shows an acceptance of the offer made by the subsequent conduct of H & M Cattle Company; and therefore, there is, nevertheless, sufficient evidence to sustain the jury's finding, even assuming appellant's own view of the evidence to be correct. An offer was made by Hendler whereby ewes were to be submitted for slaughter at the rate of fifty cents per head. Thereafter, ewes were in fact submitted to H & M Cattle Company for slaughter. H & M Cattle Company slaughtered the ewes and billed for its services at the rate of fifty cents per head. It is difficult to imagine an acceptance by more unequivocal conduct than this. Appellant's entire thesis on this appeal seems to be that an oral contract

is impossible to be formed in the absence of the offeree raising his hand, standing upon his feet and stating with due formality, "I accept your offer; we now have a contract." This thesis not only ignores the realities of the business world in general and the meat packing business in particular, but it ignores, as well, the established law on the subject. The authorities are unanimous in holding that conduct may constitute an acceptance. *Radley v. Smith*, 6 Utah 2d 314, 313 P.2d 465, (1957); *R. J. Daum Construction Co. v. Child*, 122 Utah 194, 247 P.2d 817 (1952); *Thornton v. Pasch*, 104 Utah 313, 139 P.2d 1002, 1003 (1943); In re *Langdon's Estate*, 195 P.2d 317 (Kan., 1948). In the last cited case, the court pronounced the rule in the following appropriate language:

> "It is true no express written agreement was shown but that was unnecessary. Parties may be bound as firmly by implied contracts as by those expressed in words, oral or written. The law implies from circumstances and the silent language of men's conduct and actions, contracts and promises as forcible and binding as those made by express words or through the medium of written memorials."

The fourth contention made by the appellant is that the *only* evidence of record to substantiate the finding of a parol contract was the testimony of Mr. Hendler and that his testimony with respect to showing such an acceptance constitutes his opinions or conclusions only. Not only does appellant ignore the testimony of Ray McFarland, but once again, appellant

ignores the concept that conduct may constitute acceptance and in so doing ignores the evidence relating thereto that has been reiterated so many times in this brief.

Hendler's and McFarland's testimony relating to acceptance at the meeting supplied the jury with the basis for an alternative finding of acceptance. It was not the only evidence of record. As indicated above, the evidence relating to acceptance by conduct is also ample to support the jury's verdict. Additionally, it is submitted that much of the testimony quoted above did not constitute bald conclusions. Much of this testimony is as susceptible of the interpretation that what is being recited was what was actually said as it is susceptible of appellant's contention that it is the witness's mental impressions only. As stated at 20 Am. Jur., Evidence, Sec. 771:

> "The general rule excluding opinions of witnesses is simple in statement, but not so simple in application, for it is not always easy to distinguish in the testimony of a witness facts within his knowledge or observation from his opinions on facts. As a general rule, a witness may testify directly to a composite fact although in a sense his testimony may include his conclusion from other facts. * * * The true solution seems to be that such questions are left for the practical discretion of the trial court."

Moreover, assuming arguendo only, that Hendler's testimony with respect to acceptance of his offer at the time of the meeting was principally conclusions, all

of the testimony quoted, supra, was received without objection or motion to strike by appellant and a great deal of it was actually elicited on cross-examination. It is well-established law that objections not made to the admissibility of such evidence are lost on appeal; and such evidence, though constituting conclusions, in the absence of objection, is competent to support the jury's findings.

20 Am. Jur., Evidence, Sec. 1185, states the rule as follows:

> "The fact that evidence which is introduced in a case may be, if objected to, incompetent evidence under some one or more exclusionary rule of evidence, does not destroy its probative effect if it is admitted without objection. It is the generally prevailing rule that relevant evidence received without objection may properly be considered, although it would have been excluded if objection had been made. Such evidence, where admitted without objection, has the force and effect of proper evidence and is to be accorded its natural probative effect as though it were admissible under the established rules of practice."

At the annotation appearing at 120 A.L.R 213, it is stated that the overwhelming majority of the cases in this country on the subject agree that objectionable conclusion evidence should be given consideration in ruling upon a motion for non-suit or directed verdict. And, in 5 Am. Jur. 2d, Appeal and Error, Sec. 737, p. 182, the rule is stated thusly:

"Where evidence, although inadmissible on proper objection, is received below without objection, the court, on appeal, may properly consider it in support of the decision of the trial court."

POINT 2. EXHIBIT 2 WAS PROPERLY ADMITTED OVER APPELLANT'S OBJECTION THAT IT WAS HEARSAY.

Appellant contends that the billings contained in Exhibit 2 constitute hearsay testimony and that the same were improperly admitted over objection. As pointed out earlier in this brief, these billings, together with other conduct by H & M, could per se have been considered by the jury as constituting the acceptance of Hendler's offer. When thus viewed, the billings take on an importance independent of the declarations therein contained. The very fact that these billings were rendered now becomes significant. Much like a verbal utterance of acceptance, the fact that the utterance was made, not the truth or falsity thereof, is the purpose of the testimony. It was stated by this court in *Hawkins v. Perry,* 123 Utah 16, 253 P.2d 372, 374 (1953), as follows:

"* * * Perry's statements at the time of the transaction were not declarations as to some antecedent happening which the percipient witnesses are relating to us second-hand. They are the verbal acts which go to make up the very transaction which is under scrutiny to determine its legal effect. The fact that promises and representations were made is material to the issues

of this action; they do not evidence 'the truth of the matter * * * asserted therein * * *,' at least in the sense that Wigmore uses that phrase. * * * "

The following pronouncement by the Supreme Court of Colorado is also appropriate here:

> " * * * In ultimately excluding exhibit B, the court, as likewise did plaintiff's counsel in objecting to the court's admission of exhibits C and D, misapprehend the purpose of these exhibits. As already noted the company is relying upon its oral contract, and plaintiff denies any such contract. Where the existence of an alleged oral contract is the main issue involved in a case, as here, and the making of the 'oral contract is disputed, all the acts and declarations of the parties tending to establish or refute it are admissible, together with all the facts connected with the history of the transaction, and the surrounding circumstances. * * * ' The obtaining of exhibits B, C, and D tends strongly to establish the oral contract upon which defendant relies." *Andrews v. Costilla Ditch Co.*, 165 P.2d 188, (Colo., 1945).

Assuming arguendo only, that these billings constituted hearsay in the sense that their introduction was for the purpose of establishing the truth of the declarations contained therein, they were properly admissible on the basis of the most elementary exception to the hearsay rule, to wit: as admissions against interest. These billings were prepared by W. Dennis Couch, who as the statement of facts above indicates, was in fact the plant manager, the person who ran the

office, and the person responsible for obtaining money to keep the plant in operation during this period. His bosses were all principals of H & M Cattle Company and later the principals of the respondent Great Western Packing and Cattle Company. It was his duty to raise money, his duty to bill for services performed. In pursuit of his duty, he had admittedly billed Goldring Packing Company on H & M Cattle Company statements over the assumed name of H & M Dressed Beef Company. To say, as appellant says, that these billings were not sent out in the course and scope of Couch's employment and to say further that Couch was not an agent of H & M Cattle Company and later Great Western Packing and Cattle Company, the appellant, is once again to pervert the facts on this appeal. Where a declaration is made by an agent acting within the course and scope of his employment that declaration is clearly admissible as against the principal as an admission against interest. 20 Am. Jur., Evidence, Sec. 596, p. 505; *John G. Hendrie Co. v. Industrial Commission,* 12 Utah 2d 80, 362 P.2d 752 (1961).

Appellant, however, argues that Couch testified that he was never advised that there was a contract between H & M Cattle Company and respondent with respect to the killing ewes. Such testimony would affect the weight to be given to the documents, not their admissibility. Moreover, it is apparent that the jury, as was its province, rejected Couch's assertion.

CONCLUSION

The comment of Justice Crockett in the case of *McCarren vs. Merrill*, supra, seems appropriate in summation of this brief:

> "The resolution of the dispute in this case is governed by the old and oft repeated rule that where the evidence is in conflict, it is the trial court's prerogative to believe that which he finds more convincing, and his findings will not be disturbed on appeal so long as there is some substantial evidence to support them."

It is therefore respectfully submitted that the judgment entered below be affirmed.

Respectfully submitted,

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